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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 893

PUBLIC SERVICE COMMISSION OF THE STATE OF WISCONSIN,

and

CITY OF CHICAGO, A MUNICIPAL CORPORATION IN THE STATE OF ILLINOIS, *Joint Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

BRIEF AMICI CURIAE ON BEHALF OF VILLAGE OF BETHANY, ILLINOIS; CITY OF CORNING, IOWA; CITY OF PINCKNEYVILLE, ILLINOIS; AND CITY OF SPEARVILLE, KANSAS; IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 42(4) of the Revised Rules of the Supreme Court of the United States, the Village of Bethany, Illinois; the City of Corning, Iowa; the City of Pinckneyville, Illinois; and the City of Spearville, Kansas, all political subdivisions of their respective

states, submit this Brief Amici Curiae in support of the Petition for a Writ of Certiorari filed by the Public Service Commission of the State of Wisconsin and the City of Chicago, a Municipal Corporation of the State of Illinois (Joint Petitioners) seeking review and ultimate reversal of an adverse decision by the United States Court of Appeals for the District of Columbia in *City of Chicago* v. *FPC,* F. 2d , slip opinion, Nos. 19604 and 19836 (D.C. Cir. 1967) (Pet. App. 19-46).

INTEREST OF AMICI CURIAE

The villages, towns and cities located in Illinois, Iowa, and Kansas joining in this Amici Brief to the Court each own and operate a gas distribution system within their respective communities serving the people, schools, municipal buildings, churches, and businesses located therein. The sole source of natural gas for their distribution systems is from the respondent, Natural Gas Pipeline Company of America (Natural). The wholesale rates charged by Natural for gas delivered at the city gates are paid directly by the amici and dictate to a substantial degree the retail price to the individual gas consumers served by their systems. While the amici are but small municipalities their proportionate share of the approximate $30 million refund at stake in the pending petition for certiorari represents, to them, a substantial sum for their respective communities.

The amici, although political subdivisions of their respective states, have no regulatory powers over the wholesale rates charged to them by Natural, an interstate pipeline company. Congress enacted the Natural Gas Act (Act) with the "primary aim . . . to protect

consumers against exploitation at the hands of natural gas companies" [1] and charged the Federal Power Commission (Commission) with the administration of the Act. By setting aside the Commission-approved Settlement Agreement whereby Natural agreed to refund to its consumers any excessive rates collected by the Company since March 1, 1961 relating to the liberalized depreciation issue, the Commission and court below inverted the purpose of Congress contrary to the scope of its powers under the Act and existing precedents to the prejudice and detriment of the amici.

REASONS FOR GRANTING THE WRIT

I. Congress Has Not Delegated to the Commission the Authority It Now Asserts Under Section 4(e) of the Act To Exercise Its Discretion To Alter the Explicit Refund Provisions of Said Section of the Act, and the Supreme Court Should Review This Novel and Unprecedented Interpretation of the Natural Gas Act

The Commission contends in the present case (Pet. App. 75), and the court below affirmed (Pet App. 41),[2] that the Commission has "equitable power" arising out of Section 4(e) of the Act to set refund dates according to its own conceptions of fairness. Thus in the instant case, it has said Natural's customers may collect refunds for illegal rates only from February 3, 1964, rather than March 1, 1961, the effective date of said illegal rates.

The most definitive statement regarding the effect of Section 4(e) is found in the oft-cited case of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350

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[1] *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

[2] *Natural Gas Pipeline Co. of America*, 33 FPC 574, 1277 (1965), *aff'd, City of Chicago* v. *FPC*, — F. 2d —, Nos. 19604 and 19836 (D.C. Cir. 1967) (Pet. App. 68, 19).

U.S. 332, 341 (1956), in which a natural gas company unsuccessfully attempted to unilaterally alter a rate settlement. The Court stated that Section 4(e) empowers the Commission to maintain the status quo pending review of new rates by suspending their operation for a limited period and "thereafter to make its order retroactive, by means of the refund procedure, *to the date the change became effective.*" (Emphasis added.) See *FPC* v. *Hunt,* 376 U.S. 515, 522 (1964); *Phillips Petroleum Co.* v. *FPC,* 349 F. 2d 535, 539 (10th Cir. 1965); *Shell Oil Co.* v. *FPC,* 334 F. 2d 1008 (3rd Cir. 1964). It has always been axiomatic under the Act (Section 4(e)) that refunds due and owing as the result of the imposition of unlawfully inflated rates begin to run from the *effective date* of the increased rates. *E.g., FPC* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 152 (1962); *Id.* So far as the intent of Section 4(e), the protective provision in question speaks for itself; it was obviously inserted to guard the gas consuming public against the imposition of unlawfully inflated rates, consistent with the overall intent of Congress, as noted above, to protect the consumers from exploitation at the hands of pipeline companies. *E.g., FPC* v. *Hope Natural Gas Co., supra* at 610. Nothing in the Act or the cases suggests the "equitable" powers now claimed for the Commission to use Section 4(e) not to protect consumers but to deprive them of refunds otherwise due. As the Supreme Court more recently noted, "the purpose of the Act is 'to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. . . .'" *FPC* v. *Tennessee Gas Transmission Co., supra* at 154. *FPC* v. *Interstate Natural Gas Co.,* 336 U.S. 577, 581 (1949) (to the same effect). In addition, whenever the financial interest of the consumer and the pipeline company collide, the Supreme Court

has inevitably come down unhesitatingly on the side of the consumer as required by the Natural Gas Act. *E.g., Id.* at 153 (even where gas company might suffer some unrecoverable losses, "[s]uch situations are entirely consistent with the policy of the Act and . . . occur with frequence.")

In summary, we are aware of no case extant[3]—nor have the Commission or lower court cited any—which holds that the Commission has the power to rewrite the refund provisions of Section 4(e) of the Act to conform with its desires in any given case. This court, however, must be wary of general statements such as the following which, cited out of context, can be misleading: "In *Federal Power Commission* v. *Tennessee Gas Transmission Company* [*supra*] . . . , the Supreme Court stressed the flexibility of the Commission's power over refunds." *Texas Eastern Transmission Corp.* v. *FPC,* 357 F. 2d 232, 240 (5th Cir. 1966). In the cited (*Tennessee*) case, the court was upholding the use by the Commission of interim order proceedings resulting in the *expedited* return of refunds back to effective date of the illegal rate increase; in so doing the court was commending the Commission in its use of proper administrative tools to protect consumers against exploitation and assure just and reasonable rates. *FPC* v. *Tennessee Gas Transmission Co., supra,* at 154. In the *Texas Eastern* case from which the above quote was taken, the circumstances are equally telling. There, the court was concerned with the Commission's power to see that refunds (collected from producers from *effec-*

[3] We are, of course, referring to cases antedating the instant one; that the Commission may consider the instant one as precedent for similar subsequent action is of no consequence. Such a see-saw argument defies judicial logic.

tive date of overcharges) were ultimately returned to the gas consumers and did not stop in the treasuries of the pipeline companies who were overcharged in the first instance. Though the court reached no decision on the issue of the power of the Commission in this respect, it is important to notice that as in the *Tennessee* case, the court was only concerned to insure that the gas consumer received his *full* due (i.e., overcharges since effective date of illegal rates) consistent with the clear intent of the Act and Section 4(e) of said Act.

In review, it is apparent that the Commission's attempt to allow Natural to retain admitted overcharges from March 1, 1961, the effective date of the unlawful rates, to February 3, 1964, not only usurps power denied it under § 4(e) of the Act but even worse, amounts to an illegal exercise of discretion *at the expense of the gas consumer,* the "intended beneficiary" of the Act,[4] directly contrary to the express desires of Congress.

II. The Commission's Attempt To Override a Binding Settlement Agreement as Well as Section 4(e) of the Act Is Contrary to the Established Statutory and Case Law and Provides an Important Precedent Detrimental to the Administration of the Natural Gas Act for the Protection of Consumers

On October 25, 1962, the Commission approved a Settlement Agreement between Natural, it customers, the City of Chicago, the Wisconsin Public Service Commission, and the Staff which specifically reserved the contested issue of the proper treatment of liberalized depreciation for future consideration and which also provided for refunds dating from the effective date (March 1, 1961) of the rate increase in question should

[4] *FPC* v. *Interstate Natural Gas Co., supra* at 581.

the reserved issue be decided adversely to Natural.[5] *Re Natural Gas Pipeline Co. of America,* 28 FPC 731 (1962) (Pet. App. 58). However, despite the Settlement Agreement, the Commission, three years after approving the Agreement, proceeded to ignore the admittedly "binding contract" (Pet. App. 70) because, in its own words, "[w]e think the most equitable resolution of this matter is to put Natural on a par with *Alabama-Tennessee.*" (Pet. App. 75.) In short, due to the pure happenstance that *Alabama-Tennessee*[6] decided the issue of the proper treatment of accelerated depreciation as of February 3, 1964, refunds due and owing to Natural's customers resulting from admittedly excessive rates effective since March 1, 1961, *at which time* the accelerated depreciation issue was specifically reserved for future treatment, must be forfeited. This defies common sense as well as the plain meaning of the Commission-approved Settlement Agreement. As dissenting Commissioner Black so aptly phrased it:

> "It is not at all uncommon in settlement proceedings or, for that matter, in fully adjudicated cases, for the parties or the Commission to reserve an issue for subsequent determination. When the severed issue is decided, *unless specific provision is made to the contrary,* it will relate back in time,

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[5] To avoid any inference, much less argument, that the decisions of the Commission and of the affirming Court were "interpretive" in their outlook, Part III, infra, has been added to show not only the clear meaning of the Settlement Agreement but in addition the admitted indifference of the Commission and of the Court to its content.

[6] *Alabama-Tennessee Natural Gas Co.,* 31 F.P.C. 208 (1964), *aff'd, Alabama-Tennessee Natural Gas Co.* v. *FPC,* 359 F. 2d 318 (5th Cir. 1966), *cert. denied,* 385 U.S. 847 (1966).

> utilizing the same test period, and fit into the agreement or the decision of the Commission just as if it had been decided along with the other issues." * (Pet. App. 80.) (Emphasis added.)
>
> * Footnote omitted.

But even more fatal to the Commission's so-called "equitable" determination than its illogicality is the complete absence of any mention, or even inference, in the refund Section (4(e)) of the Act of any discretionary power lodged in the Commission to alter a Settlement Agreement reaffirming the intent of the parties to provide for refunds from the effective date of rate increase should the contested portion of the rates be declared unlawful. *Phillips Petroleum Co.* v. *FPC*, 349 F. 2d 535 (10th Cir. 1965).

The decision of the court below held unequivocably that the Commission could ignore the terms of a Settlement Agreement (and thus necessarily Section 4(e)), as illustrated by the following conclusion:

> "The parties may well have assumed that any flow-through decision would be retroactive to 1961, they may have wholly failed to anticipate the possibility that the decision would be prospective, but they did not purport to fetter the Commission's discretion to make its decision prospective. In reaching its decision on the issues referred to it, the Commission was free to announce and apply the principles it deemed proper under the Natural Gas Act *just as if it were disposing of a proceeding in which there had been no settlement.*" (Pet. App. 46.) (Emphasis added.)

Not only is this holding clearly wrong in light of the undisputed meaning and interpretation given to Section 4(e) (as illustrated in Part I, *supra*) by Congress,

the Courts, and heretofore the Commission, but in addition, Section 4(e) aside, it appears directly contrary to a holding by the United States Court of Appeals for the Tenth Circuit as follows:

> "The refund was required by *contract* and no party contends otherwise. Since it was so required, El Paso could have commenced *legal* proceedings to enforce its rights and *no regulatory action* was required to permit it to do so." *Phillips Petroleum Co.* v. *FPC, supra* at 540 (Emphasis added).

The Court went on to conclude that where *separate refund agreement* provisions are present "the obligation to refund exists *independently of the regulatory processes.*" *Id.* (Emphasis added).

The reasoning of the court below is equally unconvincing. Unable to find any concrete support, either within the Natural Gas Act or related cases, for the Commission's exercise of "equitable powers" under the instant circumstances, the court indulged in imprecise and unrelated generalities concerning the "[i]nstructive analogy" to be found within the "legislative and judicial branches." (Pet. App. 39.) This discussion led the court to conclude that though an administrative body does not have equity powers of a judicial nature, "it may have recourse to equitable conceptions in striving for the reasonableness that broadly identifies the ambit of sound discretion." (Pet. App. 41.) Generalities of this nature, however, lend nothing to a meaningful interpretation of the Natural Gas Act, much less to the Commission's delegated authority within said Act. Further, and more important, certainly the Commission should have no powers to set aside settlement agreements expressly protecting consumers; if the Commission is to have such "equi-

table'' powers it is for the Congress, not the courts, to say so.

There is a great importance to a resolution of the question of the propriety of the lower court's holding by this Court. Settlement agreements have been a useful means in recent years of expediting the handling of multifaceted, time-consuming, and, to the small consumer, expensive rate proceedings. The value of settlement agreements to the consumer, as well as to the industry, has been recognized on numerous occasions. *E.g., Texas Eastern Transmission Corp.* v. *FPC,* 306 F. 2d 345, 347 (5th Cir. 1962). But what party will dare to enter, much less rely upon, a Commission-approved settlement agreement involving significant sums of money when there is no degree of certainty that in years to come the Commission will feel bound by its terms?

These adverse effects are clear in the present case. The parties in entering the agreement to settle the pending rate case with Natural clearly did so as the Commission and court apparently agree in the belief that they would be entitled to refunds should that portion of the increase then to be collected relating to the liberalized depreciation issue be ruled illegal. The subsequent ruling by the court below, that the Commission may override the Settlement Agreement to deprive the consumers of $30 million in admittedly excess rates collected by Natural, obviously undercuts the entire basis upon which the consumers entered the agreement. As Commissioner Black aptly stated in his dissent:

> "Here we have approved one settlement on the basis of which the parties discontinued their litigation. We are now, three years later, imposing on them an entirely different 'settlement.' In my

opinion the parties clearly would not have consummated their agreement had they known what would happen to it at the hands of the Federal Power Commission." (Pet. App. 82.)

III. The Settlement Agreement So Studiously Avoided by the Commission and Reviewing Court Clearly Contemplated Refunds Dating From March 1, 1961, the Effective Date of Natural's Rate Increase

Though as has been evident from the above, and will be illustrated further below, both the Commission and the Court of Appeals rendered decisions independent of the Settlement Agreement, a summary review of the Settlement Agreement—its terms and the environment in which it was negotiated—will be presented to guard against any contention seeking to avoid review by urging that it and the reviewing court's decisions were "interpretive."

As is evident from the above discussion of the Act (Section 4(e)) and of cases connnected therewith (see Parts I and II, *supra*), parties providing for refund provisions in rate settlements always contemplate refunds dating from the effective date of the illegal rates unless clearly specified to the contrary. Thus, it is clear what Natural's eminent counsel meant when he stated in a cover letter attached to the subject Settlement Agreement that "Natural also agrees to go to trial before the FPC on two issues and if it loses on either, to make *additional refunds and rate reductions* (over and above the unconditional ones mentioned above)." (Pet. App. 55.) (Emphasis already supplied.) It is clear that the "additional refunds," should they be required, were to be treated on a par with the "unconditional ones" which, the preceding paragraph makes clear, were to date from the effective date

of the rate increase, March 1, 1961.[7] *Id.*. The pertinent parts of the Settlement Agreement itself, though mentioning no specific date per se, are equally clear as to the intent of the parties:

> "In the event it shall be determined in these proceedings by a valid and final order of the Commission that Natural in computing its cost of service in these proceedings, must utilize the above mentioned "flow through" method of tax computation, Natural, subject to its right to seek judicial review thereof, *shall make such further refunds with interest at 7% per annum from the 20th day of each month in which each excess payment was collected,* to the date Natural refunds such excess payments, as shall result from the reduction, if any, in the level of any of the rates contained in its FPC Rate Schedules that may be required by the Commission at the time of such order." (Pet. App. 67.) (Emphasis already supplied.)

In approving the Settlement Agreement, the Commission noted that "pending our decision on these [reserved] issues, *Natural shall collect revenues subject to refund. . . .*" *Re Natural Gas Pipeline Co. of America,* Opinion No. 367, 28 FPC 731, 732 (1962) (Pet. App. 59) (emphasis added). This short proviso makes it abundantly clear that all revenues collected by Natural after March 1, 1961, were subject to refund. There is no sign or indication whatever in any of these documents that the parties contemplated an alternative date from which to collect refunds.

Apparently realizing that the above documents speak clearly for themselves, the Commission and the affirm-

[7] Re Natural Gas Pipeline Co. of America, Opinion No. 367, 28 FPC 731 (1962) (Pet. App. 59) (Ordering paragraph (D) specified March 1, 1961 as retroactive date for unconditional refunds).

ing court completely dodged the issue as to the internal meaning of the agreement.

In Opinion 456,[8] the disputed decision affirmed below, the Commission disposed of the above-recited documents in a most novel fashion. Though admitting that "the settlement represents a binding contract" and that "it is entirely clear . . . that the agreement was drafted with the possibility of refunds in mind," the Commission attempted to free itself from the effect of the admittedly "binding contract" by concluding that there was "no language in the settlement which can fairly be interpreted as *requiring* us to order refunds retroactive to the date the rate increase was put into effect by Natural." (Pet. App. 72.) (Emphasis added.) To paraphrase the above, the Commission justified its refusal to carry out the clear meaning of the Settlement Agreement on the grounds that the language used in it was not of such a mandatory nature that the Commission was bound by it. Not only is this refusal to even attempt to interpret a binding contract inexcusable on its face but in addition such an approach has been condemned in an analogous case. In *Texas Eastern Transmission Corp.* v. *FPC*, 306 F. 2d 345 (5th Cir. 1962), the Court was faced with the disputed interpretation of the refund provision of a settlement agreement by the Commission. The Court pointed out that the correctness of the refund order "depends on the correctness of the Commission's *interpretation* of the private contract." *Id.* at 346-47 (emphasis added). This comment should be contrasted with the instant case in which the Commision went to great lengths to

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[8] *Natural Gas Pipeline Co. of America*, 33 FPC 574 (1965) (Pet. App. 68).

avoid *any* interpretation or analysis of the contract. The *Texas Eastern* Court emphasized that "one sure way to discourge voluntary settlements is for the Commission, at the behest of one party or the other . . . to read into contracts things which are simply not expressed or not there, out of the thoroughly commendable (and understandable) feeling that unless that is done the result is not as good as it ought to have been." *Id.* at 348. In our own case, the Commission has committed the reverse sin—that of omission—by refusing to take cognizance of the clear meaning of the agreement in question. In short, the Commission has refused to recognize that a contract "should stand for what it says" (*Id.* at 348) and be given effect accordingly.

In affirming the Commission's Opinion No. 456, the reviewing court made no analysis of the internal meaning of the Settlement Agreement. It glossed over the Commission's meager reference to the contract, not even seeking to determine whether the Commission's conclusion on the subject were based on "substantial evidence." Rather, the Court made the following bald and bold statement already noted above:

> "The parties may well have assumed that any flow-through decision would be retroactive to 1961, they may have wholly failed to anticipate the possibility that the decision would be prospective, but they did not purport to fetter the Commission's discretion to make its decision prospective. In reaching its decision on the issues referred to it, the Commission was free to announce and apply the principles it deemed proper under the Natural Gas Act *just as if it were disposing of a proceeding in which there had been no settlement.* (Pet. App. 46.) (Emphasis added.)

Apparently realizing that Commission Opinion No. 456 was in direct conflict with the purport of the Settlement Agreement and could not be reconciled with its clear meaning, the Court in effect granted the Commission carte blanche to ignore the Settlement Agreement, thereby dealing the coup de grace not only to the Settlement Agreement in question but even more significantly to the future use of settlement agreements as an effective rate making tool.

The only official in a ruling capacity who bothered to take cognizance of the Settlement Agreement was Commissioner Black, who dissented from Opinion Nos. 456 and 456-A. As a result of an in-depth study of the Settlement Agreement, he concluded:

> "A matter of such vast importance and involving so many millions of dollars in refunds would hardly have been left to inference. If the parties to this case intended that application here of a legal and policy decision to be made some time in the indefinite future in another case [*Alabama-Tennessee*], would be prospective from the date that case was decided, *clearly they would have said so.*" (Pet. App. 81.) (Emphasis added.)

In summary, it can only be concluded from the above analysis that all the parties to the Settlement Agreement, including the Commission at the time of its approval order, anticipated that any and all refunds to which Natural's customers should subsequently become entitled would date from March 1, 1961. The unavoidability of this conclusion in turn accounts for the studious attempt by the Commission and by the court below to find means to disregard the terms of the Settlement Agreement.

CONCLUSION

For all the reasons stated in the above portions of this Amici Brief, the above-named municipal systems respectfully request that the Supreme Court of the United States grant the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by the Joint Petitioners.

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